



Taxing Matters

Navigating the complexities of the tax world

RPC

Season 3

Episode 6 – Mike Ashley wins landmark data protection case against HMRC

Alexis: Hello, and welcome to Taxing Matters, your one stop audio shop for all things tax brought to you by RPC. My name is Alexis Armitage and I will be your guide as we explore the sometimes hostile and ever-changing landscape that is the world of tax law and tax disputes. Taxing Matters brings you a fortnightly roadmap to guide you and your business through this labyrinth. In case any of you miss any crucial information or just want some bedtime reading, there is a full transcript of this and indeed every episode of Taxing Matters on our website at www.rpclegal.com/taxingmatters.

Alexis: I'm delighted to be joined today by Megan Grew, an associate in RPC's tech and media team, to discuss the recent High Court decision in Mike Ashley's case against HMRC regarding the breach of his data protection rights. Megan is an associate in RPC's media team. She advises tech and media clients on content-related disputes and pre-publication matters, including defamation, privacy and data protection law. Her clients include national newspapers, online platforms, book publishers, investigative journalists and media insurers. Welcome, Megan, and thank you so much for joining me today

Megan: Thanks Alexis, it's great to be here.

Alexis: So Megan, shall we start with a brief overview of the case and perhaps you can explain how Mike Ashley ended up in court against HMRC?

Megan: Sure, so this case goes back to 2014 when HMRC opened an inquiry into Mike Ashley's tax returns relating to the sale of certain properties that he owned. HMRC claimed that the properties had been sold at an overvalue and they said that he owed an additional \$13.6m in tax. Mike Ashley appealed that decision and he provided evidence to show that the properties had been sold at a fair market price and ultimately that tax decision was withdrawn by HMRC in October 2022. Now, under Article 15 of the UK GDPR, every individual has the right to ask an organisation to provide them with copies of their personal data that the organisation has used or stored, or otherwise processed, within the meaning of the UK GDPR. And that right can be enforced through sending what's known as a data subject access request or a DSAR. If organisations receive a DSAR, then they must undertake reasonable and proportionate searches for an individual's personal data and provide a copy of that data and certain other supplementary information within one month. If the request is complex then an organisation can have up to a maximum of three months to respond. Now there are many different data subjects rights under the UK GDPR, but this is one of the most fundamental. It allows an individual to understand how an organisation has actually taken decisions relating to them and to work out whether the organisation has been processing their personal data in accordance with the principles, which are set out in Article 5 of the UK GDPR. So that includes things like processing personal data accurately, fairly, and lawfully.

Now back to the case at hand, in September 2022, Mike Ashley sent a DSAR to HMRC seeking copies of his personal data, which had been processed in connection with the tax inquiry. At first, HMRC refused to provide any of Mike Ashley's personal data, claiming that all of the data could be withheld under the tax exemption under paragraph 2, Schedule 2 of the Data Protection Act 2018. Now the tax exemption essentially allows an organisation to withhold information where they say it would be likely to prejudice the assessment or collection of a tax or duty. We disagreed with that assessment, not least because the tax inquiry had concluded, and we believed that HMRC was withholding vast quantities of Mike's personal data that he was properly entitled to. And that's why we ultimately issued a claim in data protection on Mike Ashley's behalf.

Alexis: Brilliant, thanks so much for that background which is really useful. So what were Mike Ashley's main arguments in the case?

Megan: By the time we reached trial, HMRC had accepted that the tax exemption could not be applied in this blanket way. And they provided Mike Ashley with some of his personal data, though that was almost a year and a half after the DSAR had first been made, and remember, this is information that's supposed to be provided within three months at an absolute maximum. We still believed that Mike Ashley was not being provided with all of his personal information. And so going into the trial, were four main arguments.

The first was that HMRC had applied an unduly narrow definition of personal data, which meant that it was continuing to wrongfully withhold a considerable amount of his information. The second argument was that it was continuing to wrongly apply this tax exemption in relation to certain pieces of personal data. The third was that HMRC was wrong to claim that certain departments within HMRC fell outside the scope of the DSAR. So HMRC argued that the Valuation Office Agency, or the VOA, which had been involved in valuing the properties and had played this central role in the tax inquiry was not within scope of the DSAR. This was apparently on the basis that the VOA was a distinct entity from the main departments within HMRC. And it was HMRC's internal policy that the VOA would deal with DSARs separately, even though HMRC accepted that it was ultimately the data controller for the VOA. Now as the data controller under the GDPR, that means that HMRC is ultimately responsible for the way that the VOA had processed personal data. And so we didn't think this line of argument really followed.

The fourth and final issue going into the trial was that HMRC needed to provide additional contextual information in relation to some of the information they had provided. To add a bit of colour to this, on some occasions, HMRC had only provided extracts from documents, which included Mike Ashley's name or just his initials, without any contextual information or surrounding info. Now Article 12 and Article 15 of the UK GDPR sets out certain requirements as to how the personal data is supposed to be provided to a data subject. And we argued that HMRC hadn't fully complied with those obligations because to provide just a name or initials without any context didn't allow Mike Ashley to assess the lawfulness of the processing or to exercise his data rights in any meaningful way.

Alexis: And so on the flip side of that, what were HMRC arguing in the case?

Megan: In short, HMRC accepted that they had breached Mike Ashley's data rights by not providing this information earlier, but they argued that by the time of the trial, they had then fully complied with their obligations and that they'd provided all of the information that Mike Ashley was entitled to. HMRC said they had properly applied the definition of personal data and that they were justified in continuing to withhold certain information under the tax exemption. They also said that the scope of the DSAR allowed them to exclude certain HMRC departments from their searches, namely the VOA.

Alexis: So which court considered the case ultimately and how long did the hearing or judgement take?

Megan: The hearing took place over two days in December last year in the Media and Communications List in the High Court. The Media and Communications List is a specialist list which considers media causes of action, so primarily defamation, misuse of private information and data protection. The trial took place before Mrs Justice Williams. We instructed Anya Proops KC and Zac Sammour who are both data protection specialists at 11KBW. HMRC instructed James Cornwell, who's from the same chambers. The claim was issued under the Part 8 procedure of the Civil Procedure Rules, because it did not involve a substantial dispute over law or fact. The Part 8 procedure is much more streamlined than the ordinary course of civil litigation so there was no oral evidence at trial and it was confined to each party's counsel making legal submissions on the issues in dispute. One particular quirk of this case was that we had agreed beforehand that it would make sense for the court to undertake what's called a "closed material procedure" in relation to the information that was being withheld under the tax exemption. This is similar to a litigation privilege review where the judge essentially considers the material that's being withheld and then hears closed submissions on that before determining whether or not the exemption has been properly applied. So, on the second day of trial, there was this closed session where HMRC's counsel made submissions as to why the tax exemption applied to certain material and that was done without any of Mike Ashley's legal team being present.

Alexis: So obviously we do know the outcome, but just for the purposes of this, what did the court ultimately decide?

Megan: So overall, it was an overwhelming victory for Mike Ashley. The judge found that HMRC had misapplied the concept of personal data, meaning it was highly likely that HMRC had taken an unduly restrictive approach to the information that it provided in response to the DSAR. The judge also rejected HMRC's case on the tax exemption. The judge said that HMRC's argument that the text in question would provide an insight into how HMRC may settle tax liabilities in the future was, quote, "speculative at best". And the judge said that the information that had been withheld should now be provided alongside other contextual information. The judge also said that providing just a data subject's name and initials, as HMRC had done on at least 21 occasions, or another entirely decontextualized form of the personal data would be unlikely to satisfy a data controller's obligations under Article 12 and Article 15 of the UK GDPR. And finally, the court found that the DSAR had required HMRC to search for Mike Ashley's personal data across other HMRC departments.

The judge found that the scope of the DSAR was broad enough to encompass data processed by the VOA. And the judge said that HMRC couldn't unilaterally alter its obligations as data controller under the UK GDPR through its own internal practice of treating the main part of HMRC and the VOA as separate entities when dealing with DSARs.

Alexis: So, because Mike Ashley obviously was successful in this judgment, what was the sort of cost implication there? Did he recover his costs?

Megan: It's a great question. So Mike Ashley has been awarded 100% of his costs up to the 15th of October 2024, which is when HMRC provided that further data from the VOA. And he's also been awarded 85% of his costs thereafter.

Alexis: So a fantastic result on that front. What are the practical consequences of the decision? What information and or documents will HMRC now have to provide to Mike Ashley?

Megan: The judgment provides vindication to Mike Ashley, who was repeatedly denied access to his personal information over a number of years. Remember, this was a DSAR made in September 2022, and here we are over two years later. The court has now given a declaration that HMRC acted unlawfully in its handling of his data subject access request.

In terms of next steps, HMRC will now be required to undertake a further review of its records, applying the proper construction of the personal data concept and the guidance given by the court in its judgment to ensure that Mike Ashley is finally provided with copies of the personal information to which he has always been entitled.

Alexis: So what do you think is case means for other individuals who are dealing with HMRC, particularly regarding their data protection rights under the UK GDPR?

Megan: There are a few very important points for taxpayers coming out of this judgment. First, HMRC cannot rely on exemptions under the UK GDPR in a broad-brush way to deny taxpayers access to their personal data. Exemptions need to be applied in relation to the specific data in question and in a granular way. Secondly, HMRC cannot rely on its own assumptions about internal divisions between departments when conducting searches in response to DSARs, with the effect of excluding particular departments or entire teams from scrutiny.

Finally, and a broader point, is around the extent of the information that individuals are entitled to access under data subject access rules. The court reaffirmed that personal data includes information that relates to an individual such that it has an impact on that individual or where it's used to evaluate their interests rather than just where it identifies them directly.

So I think the judgment is not only a vindication to Mike Ashley, but it's also an important reminder to HMRC about the duties that it owes to all taxpayers. It's also a reminder about the extent of any individual's right to obtain copies of their personal data to allow them to properly understand how their information is being used by organisations who are making decisions about them. It's worth remembering that the right to access personal data under Article 15 is a fundamental right and it's a gateway to exercising other data subject rights. For example, the right to rectification of inaccurate personal data under Article 16 of the UK GDPR or the right to erasure, also known as the right to be forgotten, under Article 17. Getting access to your personal data can be an important first step in being able to take further action and fully exercising your data subject rights.

Alexis: And so to wrap up, what should HMRC and other government bodies take away from this judgment, do think?

Megan: I think the judgment raises questions around accountability and transparency both for HMRC and for other government bodies. All organisations need to have proper processes in place to comply with DSARS irrespective of the organisation's size or their internal structures and that applies just as much to government bodies as it does to smaller private entities. That includes being equipped and ready to deal with DSARs and able to correctly apply concepts such as personal data or relevant exemptions under the Data Protection Act in a granular way. Going forward, I think the judgment sets an

important precedent for individuals who may feel that they have been mistreated in inquiries undertaken by public bodies. Ultimately, DSARs are now likely to be a more powerful tool for those individuals to enable them to understand how important decisions in those inquiries were taken.

Alexis: Well, thank you so much, Megan, for today's podcast. I'm afraid that's all we've got time for today folks.

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